

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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INTEGRATED COMMUNICATIONS &
TECHNOLOGIES, INC., et al.,

Plaintiffs,

v.

HEWLETT-PACKARD FINANCIAL SERVICES
COMPANY, et al.,

Defendants.

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Civil Action No.
1:16-cv-10386-LTS

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

SCHEDULING CONFERENCE

Friday, October 20, 2017
2:00 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: This is civil action 16-10386, Integrated Communications & Technologies, Inc., et al., versus Hewlett-Packard Financial Services Company, et al.

Will counsel please identify yourselves for the record.

MR. MCGUIRE: Good afternoon, Your Honor. Josh McGuire, as local counsel to the plaintiffs.

THE COURT: All right.

MR. JOFFE: Dimitry Joffe as counsel for the plaintiffs. Good afternoon.

THE COURT: All right. Good afternoon, Mr. Joffe.

MR. CALLAGHAN: Good afternoon, Your Honor. Anthony Callaghan and Paul Saso from Gibbons, PC, counsel for the plaintiffs [sic], with Stuart Glass from Choate Hall as local counsel.

THE COURT: All right. Good afternoon. So I have the parties' submission on the Rule 16. I just have one --

Nobody is confused, by the way, as to those claims that are or are not pending?

(No responses from counsel.)

THE COURT: Usually people answer.

MR. JOFFE: Sorry.

THE COURT: I don't know how they do it elsewhere,

02:01:30 1 since you're not from -- but usually the way it works in
02:01:31 2 court is when I ask a question, what happens -- you can think
02:01:34 3 about it, and I'm happy to give you as much time to think
02:01:35 4 about it. Ordinarily, a response on the record is right --
02:01:39 5 that's the court reporter. Like a "yes" or a "no," or,
02:01:42 6 "We're not sure what you're asking for, Judge, and could you
02:01:45 7 clarify the question." I'm happy to clarify it, if there is
02:01:45 8 some confusion. But that's what I'm thinking about.

02:01:49 9 Am I missing something here?

02:01:51 10 MR. JOFFE: Okay, Your Honor, sorry. Maybe
02:01:53 11 clarify, because I misunderstood.

02:01:55 12 THE COURT: Sure. So the reason that I'm asking is
02:01:58 13 anybody confused as to the claims and counterclaims that
02:02:01 14 remain pending is because, as my understanding of your last
02:02:06 15 motion to dismiss, Mr. Joffe, is you sought to dismiss claims
02:02:10 16 that hadn't been brought. So I ruled as to -- I ruled on the
02:02:14 17 merits as to those claims you sought to dismiss that had been
02:02:17 18 brought, and I made a ruling on the merits. But I noted that
02:02:21 19 as to those claims that I thought had not been brought, that
02:02:24 20 your motion to dismiss to was moot.

02:02:26 21 But that raised in my mind a question. Either,
02:02:30 22 (a), it's conceivable that I could have erred, although there
02:02:33 23 was no motion for reconsideration filed by you. Or I just
02:02:36 24 wanted to make sure that everyone thinks that they understand
02:02:39 25 those claims that you brought, the plaintiffs brought, that

02:02:43 1 have survived the motion to dismiss, that they had filed, are
02:02:46 2 pending, and that the counterclaims they have brought are
02:02:50 3 pending; that since we've all conferred with each other for
02:02:53 4 the Rule 16, that you're all on the same page as to what
02:02:57 5 claims are pending.

02:02:59 6 MR. JOFFE: I believe we are.

02:03:01 7 MR. CALLAGHAN: Yes, Your Honor, we believe we
02:03:03 8 understand the claims that are pending.

02:03:05 9 THE COURT: Okay. Fine. I ask the question, only
02:03:09 10 because it's unusual to have a motion to dismiss claims that
02:03:11 11 hadn't been brought. So I just want to make sure that either
02:03:14 12 I hadn't missed something, or there wasn't something along
02:03:17 13 the way.

02:03:18 14 All right. I have, then, one other question to
02:03:21 15 ask.

02:03:22 16 With respect to the equipment, the equipment is in
02:03:24 17 China now; is that right?

02:03:26 18 MR. JOFFE: That's correct, Your Honor.

02:03:27 19 THE COURT: And it's in the possession of whom?

02:03:30 20 MR. JOFFE: It's located in the house of plaintiff
02:03:36 21 Jade Cheng, who is actually living now in the United States
02:03:40 22 since February of last year, he moved to the United States.
02:03:44 23 He is now a resident of New Hampshire.

02:03:46 24 THE COURT: All right.

02:03:47 25 MR. JOFFE: But the house where the equipment is, I

02:03:49 1 believe, it's his father's house. So it's in China.

02:03:54 2 THE COURT: All right. So he received -- did he --
02:03:57 3 is it your understanding that he received possession of the
02:04:00 4 equipment back from the Chinese police, or whatever?

02:04:03 5 MR. JOFFE: From Chinese police.

02:04:04 6 THE COURT: He took possession of it, put it in the
02:04:07 7 home of his father, which was the home in which he was living
02:04:09 8 at the time.

02:04:10 9 MR. JOFFE: Correct. And never touched it again.

02:04:12 10 THE COURT: And it's remained there since -- and
02:04:14 11 then at some point in time thereafter, he moved to the United
02:04:17 12 States, and the equipment remained there.

02:04:19 13 MR. JOFFE: Correct, Your Honor.

02:04:19 14 THE COURT: And his father continues to live in
02:04:21 15 that home?

02:04:22 16 MR. JOFFE: Yes. In that home or nearby.

02:04:26 17 THE COURT: His father --

02:04:28 18 MR. JOFFE: It's a small village.

02:04:29 19 THE COURT: -- continues to maintain possession and
02:04:32 20 control of that house.

02:04:34 21 MR. JOFFE: Right. Correct, Your Honor.

02:04:34 22 THE COURT: So is there any -- putting aside the
02:04:35 23 fact that each want the other to bring it back, is there any
02:04:39 24 like legal impediment to bringing it into the United States?

02:04:44 25 MR. JOFFE: Well, it's equipment as to which the

02:04:46 1 exclusive trademark owner testified repeatedly to be
02:04:52 2 counterfeit. So without any paperwork or anything else, and
02:04:58 3 having already spent several months in horrendous condition
02:05:05 4 of the jail, asking my plaintiffs to handle counterfeit
02:05:10 5 equipment, ship it across China and across the border, I
02:05:14 6 believe, and they strongly believe, is just dangerous to
02:05:17 7 their safety and health. They could be just easily
02:05:22 8 intercepted along the way. It's counterfeit equipment.

02:05:25 9 It's boxes -- I don't know how big, but they tell
02:05:28 10 me it's quite substantial number of units all together, and
02:05:32 11 they're deathly afraid of even touching it.

02:05:35 12 THE COURT: But not so deathly afraid that they're
02:05:38 13 unwilling to live with it.

02:05:41 14 MR. JOFFE: Well, they're not living with it.

02:05:43 15 THE COURT: Well, he did live with it. You told me
02:05:45 16 that it was in his home, where he was living for a period of
02:05:45 17 time.

02:05:48 18 MR. JOFFE: Right. But what was he supposed to do
02:05:51 19 with that equipment?

02:05:51 20 THE COURT: Well, he took it back from the Chinese
02:05:54 21 authorities. They gave it back to him, right?

02:05:55 22 MR. JOFFE: They gave it back to him, and the only
02:05:57 23 place he could put it was his house where he went after jail.
02:06:01 24 And that's where he put it and stores it, and that's where
02:06:04 25 it's stored. And he's not going to --

02:06:06 1 THE COURT: And all the time it's been stored, the
02:06:08 2 Chinese police have not come -- the Chinese police know it's
02:06:12 3 there, or have reason to believe it's there, since they gave
02:06:15 4 it to him and they know where he lived, right?

02:06:18 5 MR. JOFFE: Right. China is a big country, and he
02:06:21 6 starts sending it somewhere to the port, where somebody will
02:06:26 7 pick them up, who knows. It's a big collection of
02:06:30 8 counterfeit, fake equipment. He's going to be potentially,
02:06:35 9 again, arrested. There is a real --- it's not joke. It's a
02:06:38 10 substantial likelihood that moving counterfeit equipment, a
02:06:41 11 substantial shipment of counterfeit equipment attested by --

02:06:44 12 THE COURT: So why won't they be arrested?

02:06:44 13 MR. JOFFE: Why would they --

02:06:44 14 THE COURT: Why won't they be arrested if they
02:06:44 15 move?

02:06:48 16 MR. JOFFE: They are HP, they have HP China, they
02:06:52 17 can take it, and as HP, as a company, they probably could
02:06:57 18 somehow ship their own, whatever counterfeit or not equipment
02:07:02 19 or not, I hope. They will be in a better position than my
02:07:05 20 plaintiffs would. And they didn't spend seven months in
02:07:11 21 jail, Your Honor, for that equipment. So I don't see how
02:07:15 22 requiring my plaintiffs, who --

02:07:16 23 THE COURT: So I -- let me say a couple of things.
02:07:18 24 One, I think it -- I feel very badly for your clients, if
02:07:21 25 they spent seven months in jail. But the fact that they

02:07:25 1 spent seven months in jail doesn't mean that every legal
02:07:29 2 argument that you make, Mr. Joffe, is not necessarily
02:07:32 3 advanced by the fact that they spent seven months in jail.
02:07:35 4 So it is not necessarily -- it's a fact that's relevant to
02:07:39 5 this case, because it makes this case an important case.
02:07:42 6 Every case is important to the parties. But it isn't
02:07:44 7 necessarily a fact that particularly bears on each particular
02:07:47 8 issue in each particular case.

02:07:49 9 You can bring it up every time you want, if you
02:07:51 10 wish. I'm not going to prevent you from bringing anything
02:07:55 11 up. But I point it out only because it's not clear to me the
02:07:59 12 legal -- particular legal relevance of that fact.

02:08:02 13 If you're telling me there are -- I understand it,
02:08:04 14 to the extent you explain it, that they are worried or
02:08:07 15 deathly afraid of doing anything that might cause the Chinese
02:08:11 16 authorities to arrest them again, because the experience was
02:08:14 17 searing. I get that. Okay? But they did bring the case.

02:08:17 18 And it must not have been lost on them, because I'm
02:08:21 19 sure that you talked to them and must have said to them
02:08:24 20 before that you filed -- whichever number of -- you didn't
02:08:27 21 file the original complaint, but you filed many amended
02:08:30 22 complaints. You must have talked to them and told them that,
02:08:33 23 in all likelihood, the equipment would have to be examined,
02:08:37 24 and in all likelihood would have to be examined here, and in
02:08:40 25 all likelihood, if this case went to trial, those things

02:08:43 1 would have to be produced here. And at the moment, they were
02:08:46 2 their possession, custody, and control. So it's a reasonable
02:08:49 3 possibility that they might have to produce it, or be --
02:08:51 4 participate in some way in its production.

02:08:53 5 And so it's not to say that it necessarily means
02:08:57 6 that they -- that they're absolved from it, but --

02:09:03 7 So your proposal it it's their problem, they pick
02:09:06 8 it up, and they bring it here. Is that your proposal?

02:09:10 9 MR. JOFFE: My proposal -- and Your Honor, I
02:09:12 10 understand your reference to the jail, but in this particular
02:09:16 11 respect, with respect to shipping the equipment, this is, I
02:09:20 12 believe, very relevant fact. Because the whole case started
02:09:24 13 with plaintiffs selling the equipment to defendants for a
02:09:29 14 sale, and then the defendants were arrested for doing it, for
02:09:33 15 handling or selling the equipment. They are now saying that,
02:09:36 16 again, the plaintiffs should now take that equipment and ship
02:09:40 17 it, without any, you know, documents, even, that were
02:09:43 18 originally --

02:09:44 19 THE COURT: So what do you propose?

02:09:46 20 MR. JOFFE: My proposal is they have HP China, a
02:09:50 21 big subsidiary in China. They have H3C that was their
02:09:54 22 subsidiary. It's not longer a subsidiary, but it was. They
02:09:55 23 have people in China who can take that equipment, or part of
02:09:58 24 it, whatever they choose, will be happy to -- for inspection,
02:10:03 25 we made it available for inspection. It's in China, let them

02:10:07 1 take it in China. And I believe it will be much safer for
02:10:12 2 the company, HP, to ship this equipment, than plaintiffs,
02:10:18 3 who -- who are really afraid of touching it.

02:10:22 4 THE COURT: What do you say about that?

02:10:25 5 MR. CALLAGHAN: Your Honor, we believe that it's an
02:10:29 6 elemental aspect of the first seven or eight counts of the
02:10:32 7 complaint that the equipment is put in the suit, and we
02:10:38 8 believe, too, that it's subject to inspection, and we believe
02:10:38 9 it should be they who have put it in issue.

02:10:41 10 THE COURT: So let me ask a practical question,
02:10:43 11 okay. It strikes me there are three issues here, none of
02:10:45 12 which, so far, I'm hearing the answer to. One is it's going
02:10:47 13 to cost some amount of money to get the equipment here.
02:10:50 14 Okay. That seems like obvious, right? Somebody is going to
02:10:52 15 have to pay for it to go on a plane or to go on a boat and
02:10:55 16 get here.

02:10:56 17 The second is, it's going to come here. Okay?
02:10:58 18 Because the way I view it, sooner or later, this case is
02:11:03 19 going to go to trial, unless summary judgment enters or
02:11:06 20 unless you settle the case. But I operate under the
02:11:09 21 assumption, we're thinking about the trial, as we go forward
02:11:12 22 with the case, even though I recognize most cases don't go to
02:11:15 23 trial. So for the trial, I think you're going to have to
02:11:18 24 have the equipment here, because the jury is going to be --

02:11:20 25 It's a jury claim, right?

02:11:22 1 MR. JOFFE: Right. Yes, we did the jury.

02:11:24 2 THE COURT: So the jury -- it's going to be an
02:11:26 3 exhibit, you're going to have to produce that -- that to show
02:11:29 4 it, so the jury can see it, and they'll make their own
02:11:33 5 assessment as to what the evidence shows.

02:11:35 6 So I think as a practical matter, it has to come to
02:11:37 7 the United States. And this is the forum that the plaintiffs
02:11:42 8 have chosen, might or might not have any views on the Chinese
02:11:48 9 legal system or the Indian legal system, but the plaintiffs
02:11:51 10 chose to come here, so I think it comes here.

02:11:53 11 How the cost of bringing it here is one issue to be
02:11:57 12 resolved by all -- either by all of you or me. But I mean,
02:11:57 13 we're not --

02:12:00 14 It all fits in his house, so how much -- what is
02:12:03 15 the volume of this equipment? Are we talking like a whole
02:12:06 16 container of a shipping container, or more like a pick-up
02:12:10 17 truck's worth, or like two boxes from Amazon? I mean, do we
02:12:14 18 have any idea how much volume this equipment is?

02:12:17 19 MR. JOFFE: According to plaintiffs, it's heavy.
02:12:19 20 It's not so much volume, I think, but the weight. It's heavy
02:12:25 21 metal pieces.

02:12:26 22 THE COURT: So I mean, do you think the whole thing
02:12:27 23 is like the size of the table that you're sitting at? Floor
02:12:31 24 up to the table, or less?

02:12:33 25 MR. JOFFE: Your Honor, honestly, I saw pictures,

02:12:35 1 but I can't -- it's probably ten cubic feet maybe. Maybe.

02:12:41 2 THE COURT: So certainly way less.

02:12:43 3 MR. JOFFE: It's not a half a container, but it's
02:12:45 4 not something that you can pack in a --

02:12:48 5 THE COURT: A single box.

02:12:50 6 MR. JOFFE: Just a -- you can select some --

02:12:51 7 THE COURT: Right. So then the question is, if
02:12:54 8 somebody packs it up, I mean -- it's going to come here.
02:12:59 9 There's only a couple ways it can come here, right? You're
02:13:02 10 either going to hire a commercial service like FedEx or UPS,
02:13:02 11 put it in a bunch of boxes, call them up and either deliver
02:13:08 12 it to their pick-up station, or have them pick it up and then
02:13:10 13 ship it.

02:13:11 14 So the question is, as a practical matter,
02:13:13 15 plaintiff says they're afraid, because they're afraid of
02:13:15 16 getting arrested if they do it. From defendants'
02:13:19 17 perspective, is that a realistic concern, or are you
02:13:22 18 concerned? What are the issues that are presented by
02:13:25 19 shipping it, and what kind of documents would be needed to
02:13:28 20 bring it into the country?

02:13:31 21 MR. CALLAGHAN: Your Honor, to the extent that an
02:13:32 22 order would issue from this Court, I'm sure that would give
02:13:34 23 some absolution to whoever is shipping it, that it's required
02:13:37 24 for production in a legal proceeding in the US -- a certain
02:13:41 25 request made of the Court. Other than that, we have not,

02:13:43 1 frankly, given a whole lot of analysis. We could do so and
02:13:47 2 we could confer further with Mr. Joffe, but we do believe
02:13:50 3 that it's necessary to have it here. We believe the
02:13:52 4 plaintiffs put it in issue, and it should be their burden to
02:13:56 5 produce it.

02:13:56 6 THE COURT: So here's the way I look at it. I
02:13:59 7 think it should be here. The plaintiffs brought the case
02:14:01 8 here, it needs to come here, it's critical evidence in the
02:14:04 9 case. So it needs to come to the United States. And
02:14:06 10 certainly it's going to need to be here for the trial. You
02:14:10 11 might as well have it here now. All of you are in the United
02:14:11 12 States. It's going to facilitate the inspection.

02:14:13 13 I assume all of you would want to look at it. I
02:14:16 14 assume you might have witnesses who want to look at it. You
02:14:17 15 might have experts that want to look at it. If this were --
02:14:19 16 if this equipment were located somewhere in the United
02:14:22 17 States, I would be stunned if the five of you stood up in
02:14:25 18 front of me and said, "Judge, we are not interested in the
02:14:28 19 equipment. We never want to look at it. We don't want any
02:14:28 20 witness to look at it, and we're never going to bring it in
02:14:30 21 front of the jury."

02:14:31 22 MR. JOFFE: We never said that.

02:14:32 23 THE COURT: No, I know. You're not. All right.
02:14:34 24 So you need to bring it here, I think, is the point. I mean,
02:14:36 25 I say "you," I mean, all of you. It needs to come here.

02:14:40 1 So I'm happy if it's helpful to all of you -- so my
02:14:44 2 view is, (a), it needs to come here; (b), in the ordinary
02:14:48 3 course, I would say it's plaintiff's responsibility to bring
02:14:51 4 it here, because plaintiff brought the case, plaintiff has
02:14:54 5 possession, custody, and control of the property, and has had
02:14:57 6 throughout the time.

02:14:57 7 That said, I think the concern Mr. Joffe raises is
02:15:01 8 a reasonable one. At least it's reasonable -- it's
02:15:06 9 reasonable, I say, not in the sense -- I'm not making a
02:15:09 10 finding that, in fact, any of those things would happen. But
02:15:12 11 it is reasonable to at least be concerned about that as a
02:15:15 12 prospect to figure out how you're going to do this in a way
02:15:17 13 that doesn't expose somebody to a problem. So --

02:15:20 14 And given the individual plaintiffs' experience, it
02:15:25 15 would at least be -- I can understand why they would want to
02:15:27 16 tread very carefully before they did something with the --
02:15:32 17 with the goods. So expense doesn't seem to me to be the
02:15:42 18 primary issue, because if you just packed it up and -- it
02:15:46 19 might cost some amount of money for FedEx or UPS or whomever
02:15:46 20 to ship it here, but it's nothing that -- it doesn't seem to
02:15:52 21 me to be the issue that divides you. And in the ordinary
02:15:54 22 course, I view that as plaintiff's responsibility, you get
02:15:56 23 it. If it was in Omaha, I'd tell you, bring it to wherever
02:16:00 24 it is, and a reasonable location.

02:16:02 25 So the real issue is, is it going to expose someone

02:16:05 1 to liability. That seems a reasonable concern. And I
02:16:07 2 think -- my suggestion is this: All of you need to figure
02:16:10 3 out -- it doesn't sound like you've all explored in a
02:16:13 4 specific way, like how you're actually going to get it here
02:16:16 5 and what does that actually mean. I think you should do that
02:16:19 6 together. I'm perfectly happy to issue a court order that
02:16:22 7 says: This property, identified in some specific way that
02:16:25 8 you tell me that specifically identifies it, is required in
02:16:29 9 the United States for adjudication of legal claims between
02:16:32 10 the parties over whether -- over their various issues. And
02:16:37 11 that either the parties agree or there's a question --

02:16:40 12 At least it's certainly in my mind, it's raised as
02:16:42 13 a question, put in play that it's counterfeit. I'm not
02:16:46 14 prepared to find that it's counterfeit based on the
02:16:50 15 complaint, but I'm certainly prepared to find that they
02:16:54 16 stated a claim that it's counterfeit. And whatever -- if
02:16:56 17 there's particular language that you think is helpful, I'm
02:17:00 18 happy to issue an order like that. But I think that you
02:17:06 19 should all --

02:17:07 20 So I think it's worthy of some discussion about how
02:17:11 21 it's actually going to get here. I mean, one possibility
02:17:15 22 like would be, you know, your client tells his dad -- I
02:17:18 23 assume it's in boxes or no? Put it in shipping boxes and
02:17:22 24 call --

02:17:22 25 What would happen if they called FedEx and said we:

02:17:25 1 Have these boxes, we want them shipped to your office,
02:17:29 2 Mr. Joffe, or wherever, you know. And what would happen,
02:17:32 3 what paperwork is needed, and what kind of concerns do people
02:17:35 4 have? And to the extent defendants, you can do something to
02:17:39 5 help facilitate that, then fine.

02:17:42 6 Yes, I agree it has to come here. Yes, I agree in
02:17:45 7 the ordinary course, the responsibility would be plaintiffs.
02:17:49 8 But there's an extra wrinkle here, and I think you should
02:17:52 9 cooperate with each other and figure out how we're going to
02:17:55 10 get it here. And if that means that, you know, HP should
02:18:00 11 issue the order to UPS to get it here, fine. Then why
02:18:06 12 wouldn't you --

02:18:07 13 You'll have to make arrangements with him, because
02:18:10 14 it's your client's house, and I don't think you can sit back
02:18:12 15 and say: Given what happened, their problem to get it here.
02:18:16 16 It's coming here, in the ordinary course, your responsibility
02:18:20 17 as the plaintiff to bring it here. But yes, I think the
02:18:22 18 concern that you raise is a real one and worthy of at
02:18:26 19 least -- so you should talk to each other. Maybe it has to
02:18:29 20 go through HP. If it does, I would think you could work that
02:18:31 21 out and that's fine.

02:18:32 22 Maybe there's a particular document in addition to
02:18:34 23 my court order. I don't know what the Chinese authorities,
02:18:37 24 if anything, they're going to want in order to bring it out,
02:18:40 25 or FedEx, or whatever international transport service you use

02:18:45 1 is going to want to -- in order -- are they going to need
02:18:51 2 documentation to bring it out, and what's that going to take?
02:18:54 3 And I think you should figure that out. Because whomever is
02:18:57 4 doing it, it's going to be -- you're going to need the same
02:18:59 5 paperwork, whether the plaintiff does it or the defendant
02:19:01 6 does it. And you both have an interest, at this point
02:19:05 7 essentially an obligation to get it out. So I think you
02:19:08 8 should talk to each other to work that out.

02:19:11 9 And if you need, then, either a further order, or
02:19:14 10 if it leads to some dispute between you as to a particular,
02:19:18 11 like aspect of that, I'm happy to try to resolve that. But I
02:19:23 12 think that --

02:19:27 13 Does that make sense? Any questions about that?

02:19:29 14 MR. JOFFE: Your Honor, I have, rather, two
02:19:31 15 comments, if I may, on this.

02:19:32 16 THE COURT: Yes.

02:19:33 17 MR. JOFFE: I am grateful for your proposed
02:19:37 18 resolution of this issue. But I also want to refer to the
02:19:40 19 sequence of -- in time. It -- the moving of the equipment,
02:19:46 20 whoever moves it, I think to me, would be involved and maybe
02:19:51 21 complicated process with the orders and getting it
02:19:55 22 physically. And there is absolutely no reason for wait with
02:20:00 23 discovery requests as defendant suggested, until the
02:20:05 24 equipment gets here. And that's one. I think we can proceed
02:20:08 25 with discovery of documents in parallel with getting the

02:20:12 1 equipment out. That's my first comment.

02:20:14 2 And the second, I would like to refer Your Honor to
02:20:17 3 Local Rule 26.3 on phasing of discovery, that says that the
02:20:23 4 judge can limit, can sequence discovery and phase it, and
02:20:27 5 limit the first phase of the -- to develop information needed
02:20:31 6 for a listed assessment of the case. And if the case does
02:20:35 7 not terminate, the second phase will be directed at
02:20:38 8 information needed to prepare for trial. And the reason I
02:20:43 9 cite this rule is the following, Your Honor, and it goes to
02:20:48 10 the whole view of sequencing the discovery -- I apologize.

02:20:52 11 The defendants inspected that equipment several
02:20:54 12 times in 2012/2013 framework. We know that. H3C inspected
02:21:00 13 it, HP inspected it, people from United States came, HP legal
02:21:08 14 and lawyer team. They have reports, they have finding that
02:21:11 15 they relaid the data. All that data and the reports, and the
02:21:18 16 statements that they made is actually what caused the
02:21:21 17 disaster. It was done in 2013. They have in their
02:21:24 18 possessions those case files, those reports of the
02:21:27 19 inspections, and all the underlying data. This is very easy
02:21:32 20 to produce. It's ready and accessible. You don't need to go
02:21:36 21 into multiple servers across the country. HP was doing the
02:21:40 22 inspections.

02:21:41 23 And so my proposal is, let's see what they know
02:21:44 24 about this equipment, because they've already inspected it.
02:21:51 25 H3C inspected all of it in 2012, and they arrested it. Every

02:21:56 1 single piece. They inspected it and reported it all
02:21:58 2 counterfeit.

02:21:58 3 THE COURT: So what are you asking?

02:22:00 4 MR. JOFFE: I'm asking that before, or in parallel
02:22:02 5 in getting the equipment itself, let us see what their
02:22:07 6 contemporaneous inspections of those equipments say. They
02:22:11 7 are sitting here now, telling us to go and bring this
02:22:14 8 equipment from China, and they have in their possessions
02:22:18 9 2013, the reports, inspection reports, reports of all the,
02:22:25 10 you know, investigations that they've done. They cite it in
02:22:29 11 their letter. They say that we inspected it, H3C inspected
02:22:36 12 it. HP immediately commenced investigating --

02:22:37 13 THE COURT: Have you ever inspected it?

02:22:39 14 MR. JOFFE: What?

02:22:39 15 THE COURT: Have you ever inspected it?

02:22:41 16 MR. JOFFE: I haven't seen it.

02:22:42 17 THE COURT: Have you ever had anyone inspect it?

02:22:45 18 MR. JOFFE: No, we haven't -- we were arrested --
02:22:48 19 not -- I mean, plaintiffs were in the office when H3C and the
02:22:53 20 arresting police officer came, and they took all the --

02:22:56 21 THE COURT: Your clients were released from custody
02:22:58 22 when?

02:22:58 23 MR. JOFFE: My clients were released from custody
02:23:00 24 in July of, I believe, 2013, on bail --

02:23:05 25 THE COURT: And the property was returned to Mr. --

02:23:09 1 Mr. Cheng, who --

02:23:11 2 MR. JOFFE: The property was returned to Mr. Cheng.
02:23:14 3 I understand he couldn't --

02:23:14 4 THE COURT: When was it returned to Mr. Cheng?

02:23:17 5 MR. JOFFE: After he's released from prison. So it
02:23:19 6 would be some time in 2013.

02:23:21 7 THE COURT: All right.

02:23:22 8 MR. JOFFE: Or maybe from when he was -- I'm not
02:23:24 9 sure. He was released from the --

02:23:27 10 THE COURT: He was released first, and later the
02:23:29 11 charges were dismissed.

02:23:31 12 MR. JOFFE: Yes, in 2014. So it might have been
02:23:34 13 2014.

02:23:34 14 THE COURT: That would seem more likely.

02:23:35 15 MR. JOFFE: More likely.

02:23:36 16 THE COURT: But you don't know exactly.

02:23:38 17 MR. JOFFE: I don't know exactly.

02:23:39 18 THE COURT: So some time, no later, would it seem,
02:23:42 19 than 2014. So as far as you know, you haven't had anybody --
02:23:47 20 you, as counsel, haven't had anybody inspect the property
02:23:51 21 since you've been in the case?

02:23:52 22 MR. JOFFE: No, we haven't. We haven't.

02:23:54 23 THE COURT: And you have no idea whether -- is it
02:23:56 24 fair to say or not, that you had no idea whether your
02:23:59 25 clients, any of your clients, after the property was returned

02:24:02 1 to them, inspected the property?

02:24:05 2 MR. JOFFE: No, I know that they didn't. That I
02:24:07 3 do.

02:24:07 4 THE COURT: You know they did not.

02:24:09 5 MR. JOFFE: Yeah, they did not inspect the
02:24:11 6 property.

02:24:11 7 THE COURT: All right.

02:24:11 8 MR. JOFFE: And one more thing about inspections,
02:24:14 9 Your Honor. This is H3C equipment. H3C is a manufacturer
02:24:19 10 and exclusive trademark holder of H3C logos and trademarks.

02:24:24 11 THE COURT: What do you mean when you say it's "H3C
02:24:28 12 equipment"? What does that mean? They don't own the
02:24:30 13 equipment, your client owns the equipment.

02:24:32 14 MR. JOFFE: No, no. I'm saying H3C manufactured
02:24:35 15 the equipment, so H3C is exclusive trademark owner.

02:24:40 16 THE COURT: So it's alleged to be -- the allegation
02:24:40 17 is it's really that it's counterfeit H3C equipment.

02:24:45 18 MR. JOFFE: Right.

02:24:46 19 THE COURT: Okay. Not that it's H3C posing --

02:24:47 20 MR. JOFFE: No, no. The point is that it's H3C
02:24:50 21 itself, its experts, testified to the police that we're
02:24:54 22 exclusive trademark holder. We're telling you, police, that
02:24:58 23 this equipment is counterfeit and they, on the record from
02:25:01 24 2012 --

02:25:02 25 THE COURT: So what you want me to do is order

02:25:04 1 that -- putting aside what I do about the equipment, you want
02:25:06 2 me to order that now, while we're waiting for the equipment,
02:25:11 3 that they should disclose to you whatever documents they have
02:25:18 4 with respect for inspections.

02:25:19 5 What would be the purpose of organizing
02:25:21 6 discovery -- is it your proposal that that should happen
02:25:24 7 before anything else?

02:25:25 8 MR. JOFFE: Correct, Your Honor.

02:25:25 9 THE COURT: And no other discovery should happen at
02:25:27 10 the moment?

02:25:28 11 MR. JOFFE: No, that discovery is a -- we'll be
02:25:32 12 happy to produce all documents.

02:25:33 13 THE COURT: Are you saying that discovery should
02:25:35 14 just commence generally, right now, and that as part of that,
02:25:39 15 then obviously you would presumably request that as part of
02:25:42 16 their initial disclosures, they would disclose that? Or
02:25:47 17 that's different? Or are you saying that this thing should
02:25:50 18 happen automatically first?

02:25:51 19 MR. JOFFE: No, I'm saying that Rule 26.3 --

02:25:54 20 THE COURT: I get it, that phasing is permissible.

02:25:54 21 MR. JOFFE: It's phasing, so --

02:25:57 22 THE COURT: But I'm asking you, what phasing do you
02:26:00 23 want to do?

02:26:00 24 MR. JOFFE: I want to first exchange documents from
02:26:02 25 plaintiffs and defendants.

02:26:03 1 THE COURT: All right. So you want document
02:26:06 2 exchange to happen right away, of all things. Not just the
02:26:09 3 one thing you talked about, all document exchange happens
02:26:13 4 right away, and that commencement should not await for the
02:26:17 5 production of equipment for inspection.

02:26:18 6 MR. JOFFE: Right. The equipment could -- we can
02:26:20 7 arrange and start talking and delivering this equipment.
02:26:23 8 That's fine. But they already have, defendants, in their
02:26:28 9 possession, records of contemporaneous inspections of those
02:26:33 10 equipment in 2012, 2013, and testimony in 2014, where H3C is
02:26:40 11 saying to the police, "This is counterfeit equipment, we're
02:26:43 12 the only trademark holder," says H3C. Nobody else can tell
02:26:49 13 anything, even HP doesn't have trademark to H3C. That's what
02:26:54 14 H3C says. So we have the statement of the exclusive
02:26:56 15 trademark holder and owner of the equipment --

02:26:58 16 THE COURT: Of course, H3C saying it doesn't make
02:27:01 17 it so.

02:27:02 18 MR. JOFFE: Who else can dispute it, Your Honor, if
02:27:05 19 trademark owner telling you the trademark --

02:27:07 20 THE COURT: I have lots of trademark cases where
02:27:10 21 people dispute all sorts of things. I mean, I agree with you
02:27:14 22 that ordinarily you would think that if the trademark is H3C,
02:27:16 23 and H3C is a company, they would hold it. But I'm just
02:27:20 24 saying that's -- you're telling me what their position is. I
02:27:22 25 have no idea the relationship between these different

02:27:25 1 companies and what licensing agreements or contractual
02:27:27 2 arrangement they have. So all I'm saying is I know that what
02:27:31 3 you're telling me is H3C says this, but the fact that H3C
02:27:37 4 says it, that might make it so, but that might not
02:27:41 5 necessarily make it so. I don't know. That's a different
02:27:43 6 issue. But I just note that, because I think it's important
02:27:45 7 to keep track of what's what.

02:27:47 8 MR. JOFFE: Right. Except for -- like for example,
02:27:50 9 if you don't -- Gucci says, "This Gucci bag is fake." Who
02:27:54 10 can say -- which expert can say, "No, Gucci, you're wrong.
02:27:58 11 It's your bag"?

02:27:58 12 THE COURT: Do you want to know which expert could
02:28:00 13 say?

02:28:00 14 MR. JOFFE: Which?

02:28:00 15 THE COURT: We'll start with, do you see those
02:28:00 16 empty chairs over there?

02:28:03 17 MR. JOFFE: Wonderful.

02:28:03 18 THE COURT: Do you know who sits in those empty
02:28:05 19 chairs? Who sits in those chairs?

02:28:06 20 MR. JOFFE: Jury.

02:28:07 21 THE COURT: And so let's suppose you have a
02:28:10 22 counterfeit case and Gucci comes on, and Gucci's expert says,
02:28:15 23 "I've worked for Gucci. I've worked for 40 years for Gucci,
02:28:17 24 and that bag is fake," -- okay? And if Gucci -- if, at the
02:28:21 25 end of the trial, Gucci's lawyer says, "Judge, we don't even

02:28:25 1 need to go to the jury, our expert says we win," do you know
02:28:28 2 what I would say to them? Wrong. The jury decides. The
02:28:31 3 jury can decide they don't believe the expert.

02:28:39 4 MR. JOFFE: You're right. My local counsel
02:28:41 5 suggested to me they're the ones on the record saying that
02:28:44 6 the equipment is counterfeit. Not even H3C, the defendants.
02:28:51 7 HP is saying it, in a letter that I have.

02:28:53 8 And by the way, I think that I saw somewhere in the
02:28:58 9 papers that these letters are not on the record. They are.
02:29:02 10 It's document 22-2 and 22-3. That's where the -- HP
02:29:06 11 Enterprise India, signed by David Gill, says the equipment is
02:29:09 12 counterfeit. So H3C says it's counterfeit. HP Enterprise
02:29:14 13 India says it's counterfeit. David Gill, who is both at HP
02:29:17 14 Enterprise India and HP Enterprise US says it's counterfeit.
02:29:24 15 Well --

02:29:25 16 THE COURT: It might be counterfeit. I don't know.
02:29:28 17 But in the end, the expert -- you're asking who decides. In
02:29:31 18 the end, the jury decides.

02:29:33 19 MR. JOFFE: Okay. But Your Honor --

02:29:35 20 THE COURT: But I get your point. You're saying
02:29:37 21 why should we wait for discovery --

02:29:39 22 MR. JOFFE: Let's exchange documents.

02:29:41 23 THE COURT: Right. So you're not looking for those
02:29:42 24 one thing. You're just saying -- if I'm understanding you
02:29:46 25 correctly, you're not saying, the first thing that should

02:29:49 1 happen is they produce inspection documents. You're saying
02:29:52 2 they have inspection documents. But what you're saying we
02:29:54 3 should just start -- you're not even really saying phase
02:29:58 4 discovery, if I'm understanding you correctly. You're just
02:30:01 5 saying we should commence discovery now.

02:30:03 6 One of the things of discovery that will happen is
02:30:06 7 the equipment will be brought over, but we shouldn't have
02:30:08 8 to -- you're actually asking not for phased discovery.
02:30:11 9 You're actually saying you should just start discovery now.
02:30:12 10 You don't want phased discovery under local Rule 26 point
02:30:16 11 whatever, you just want to start discovery now. One of the
02:30:18 12 things in discovery would be production. You just don't want
02:30:21 13 to delay the paper discovery for -- to occur -- you don't
02:30:26 14 want to delay paper discovery until after the things come
02:30:30 15 here.

02:30:31 16 MR. JOFFE: That's correct.

02:30:31 17 THE COURT: So that's -- in that sense, are you
02:30:32 18 asking for -- it sort of seems like --

02:30:35 19 MR. JOFFE: Well, in a sense, you know, the point
02:30:37 20 that I'm trying to make is in their possession, there are
02:30:41 21 reports of those inspections --

02:30:42 22 THE COURT: Yes, I get that.

02:30:43 23 MR. JOFFE: -- that were done in 2013. When they
02:30:46 24 produce it and related to respondent, very narrow set of
02:30:48 25 documents, we will see if the case terminates or needs to go

02:30:51 1 to trial. Because in those reports it may be, because
02:30:54 2 they've determined it, it will say the equipment is
02:30:57 3 counterfeit, or the equipment is --

02:30:59 4 THE COURT: But suppose those documents say that
02:31:02 5 the equipment is counterfeit. Let's suppose they say
02:31:05 6 everywhere that the equipment is counterfeit. How does that
02:31:09 7 terminate the case?

02:31:10 8 MR. JOFFE: Well, it -- if their documents, based
02:31:12 9 on their contemporaneous inspection, said the equipment is
02:31:15 10 counterfeit, H3C, the manufacturer's equipment, we have their
02:31:20 11 records saying that it's counterfeit, then that might end the
02:31:27 12 case, because it would be then subject to summary judgment,
02:31:32 13 if their documents, themselves, show one way or the other.
02:31:36 14 Then it doesn't have to be counterfeit. It may say genuine.
02:31:42 15 The equipment is genuine.

02:31:44 16 And people are sitting -- well, I don't want to
02:31:46 17 refer to jail again, but if they knew it was genuine and they
02:31:50 18 haven't admitted it until now, that's one thing. If they
02:31:54 19 knew it was --

02:31:56 20 THE COURT: What I'm trying to understand is, for
02:31:58 21 example, you have a false imprisonment claim. How does the
02:32:01 22 fact that, after your clients were in prison, there's
02:32:04 23 documents supposing that that's what they say. Supposing the
02:32:07 24 documents unequivocally say that it's counterfeit. How does
02:32:11 25 that establish -- how does that automatically establish

02:32:16 1 summary judgment?

02:32:18 2 MR. JOFFE: Because that confirms what they said in
02:32:21 3 their letter in 2013. And what they say is what our theory
02:32:25 4 is, that the equipment came from HPFS, that it was
02:32:31 5 counterfeit before it was sold to us; that we had all the
02:32:34 6 reasons to rely, they say -- we had reasons to rely on them,
02:32:38 7 because it came from them. And if the internal documents and
02:32:42 8 the results of inspection confirm all of that, all of it, I
02:32:46 9 don't think there will be a reasonable issue as to whether
02:32:49 10 there's -- equipment is counterfeit or not. Because we'll
02:32:53 11 have H3C saying, "We inspected all of it and" --

02:32:56 12 THE COURT: I guess the reason that I'm just asking
02:32:57 13 a question is, like, it seems like an obvious document you
02:33:02 14 would want to see. It seems like an obviously discoverable
02:33:05 15 document in the ordinary course, unless there's some reason
02:33:08 16 why it wouldn't come up in discovery and be produced --

02:33:14 17 MR. JOFFE: There is one reason why it --

02:33:15 18 THE COURT: And -- but I don't know that it's -- to
02:33:16 19 me, while I see a possible dispute between the parties over
02:33:21 20 whether the equipment is fraudulent, in the sense that I'm
02:33:23 21 not prepared to say here -- on the record before the court,
02:33:26 22 that is, there's a motion and pending claims and
02:33:29 23 counterclaims, those, in and of itself, don't establish that
02:33:32 24 the equipment is counterfeit.

02:33:34 25 I'm not saying it's not counterfeit, but there's

02:33:37 1 not been an adjudication of that. That's not how, as you
02:33:39 2 well know, litigation works. And you know, you then need a
02:33:40 3 binding stipulation from them, or you need a determination on
02:33:44 4 the record as a result of a motion. But to me, the way I see
02:33:47 5 it, and maybe I'm missing something, but a possible issue
02:33:54 6 certainly dividing the parties is whether the equipment is
02:33:56 7 fraudulent.

02:33:57 8 But a greater issue dividing the parties strikes me
02:34:00 9 is, even if it is fraudulent, even if it's -- now everyone
02:34:04 10 inspects it, indisputably agrees it's fraudulent -- I have
02:34:08 11 the sense from reading the papers that the parties disagree
02:34:11 12 over whether they knew it was fraudulent, or who knew it was
02:34:15 13 fraudulent and when. And as to some of the other claims,
02:34:18 14 what -- the various duties and responsibilities. So do I
02:34:20 15 agree with you that, in the ordinary course, do you get those
02:34:24 16 documents? Yes. But I guess I'm just not sure why, if they
02:34:30 17 produce them and if it says what you think it says, it
02:34:34 18 automatically terminates the case in your favor or
02:34:34 19 automatically provides a simple, clear motion for summary
02:34:34 20 judgement that would end the case if they didn't otherwise
02:34:34 21 see it that way.

02:34:38 22 MR. JOFFE: Well, one of the things they said back
02:34:40 23 in March 2013 was that HP is currently investigating where
02:34:47 24 the counterfeit equipment came from and who -- who made it
02:34:52 25 counterfeit. That was in March 2013. If they were

02:34:56 1 investigating it in March 2013, they should have some report
02:35:00 2 that says, "This equipment came from," whatever data or
02:35:05 3 whatnot. They will have it. We don't need to reinvent the
02:35:11 4 bicycle here.

02:35:12 5 THE COURT: Let's see what they say.

02:35:14 6 MR. JOFFE: Yes.

02:35:14 7 THE COURT: So as to the request that discovery
02:35:17 8 should commence while we're getting the equipment, or at
02:35:22 9 least paper discovery should commence, not depositions --
02:35:24 10 that's what I understand Mr. Joffe to be saying. What about
02:35:27 11 that?

02:35:27 12 MR. JOFFE: Yes.

02:35:28 13 MR. CALLAGHAN: Well, Your Honor, we think sort of
02:35:31 14 the counterpoint to what Mr. Joffe suggests. We think, if
02:35:33 15 the equipment was made available and we both had an
02:35:35 16 opportunity to inspect it, it would narrow the issues
02:35:37 17 substantially, either it's counterfeit or it's not.

02:35:40 18 Now, Mr. Joffe says that we, at some point,
02:35:43 19 attested in writing saying, by Mr. Gill, that it wasn't. But
02:35:47 20 that didn't happen. As you'll recall, there was a draft
02:35:50 21 letter being exchanged back and forth. And in the draft
02:35:53 22 letter, there was surmise, or at least at the time that the
02:35:56 23 letter was being drafted, there was surmise. And it could
02:35:58 24 have been counterfeit when it left India, therefore, they
02:35:59 25 would have been reasonable in relying that it wasn't

02:36:02 1 counterfeit. That, upon further reflection and upon further
02:36:06 2 consideration, was amended before it was ultimately signed
02:36:09 3 and committed. So there was nothing signed to say that the
02:36:12 4 equipment was counterfeit when it left us. Number one.

02:36:15 5 Number two, if the equipment is counterfeit, that
02:36:19 6 sends us in one direction. If the equipment is not
02:36:22 7 counterfeit, that sends us in another direction. If the
02:36:25 8 equipment was counterfeit because of something that was done
02:36:28 9 with the labels, that's not an indication that it was
02:36:29 10 counterfeit. If the equipment is counterfeit because the
02:36:31 11 software that's written on the transceivers was internally
02:36:38 12 counterfeit, that sends us in another direction. We just
02:36:42 13 need, for the short time it would take to get the equipment,
02:36:45 14 assuming it can be done --

02:36:45 15 THE COURT: What -- did anybody, for any HP-related
02:36:49 16 entity -- and was H3C a related entity at the time? --
02:36:54 17 inspect the property back then?

02:36:56 18 MR. GLASS: We believe H3C had access to the
02:37:00 19 property quite a bit after it was seized. H3C issued a
02:37:03 20 report to the police, which has been quoted, at some length,
02:37:07 21 in the second amended complaint. That report is available,
02:37:11 22 and H3 C is not part of this case, for some reason, Your
02:37:15 23 Honor. H3C, if it were here, could answer that question, or
02:37:19 24 we could represent to the Court what it --

02:37:22 25 THE COURT: Well, what's the corporate relationship

02:37:24 1 between H3C and your clients?

02:37:26 2 MR. GLASS: The corporate relationship today, we
02:37:28 3 believe, Your Honor, is HPI, which was recently served,
02:37:30 4 that's one of the split-offs from the HP. So we have HP,
02:37:34 5 HPI, HPE. HPE is before you today. HPI, I'm sure, will be
02:37:39 6 here soon. I think they have to file an answer or a motion
02:37:42 7 at the end of the month or the beginning of the next. HPI is
02:37:46 8 a minority shareholder, and H3C. At the time --

02:37:50 9 THE COURT: Right now.

02:37:51 10 MR. GLASS: Right now. I think in 2010, HP
02:37:57 11 purchased.

02:37:58 12 MR. JOFFE: 3Com.

02:38:00 13 MR. CALLAGHAN: 3Com, which was an entity that was
02:38:04 14 a split of Huawei -- please excuse my pronunciation. H3C was
02:38:06 15 the Chinese subsidiary of 3Com. HP acquires 3Com.

02:38:12 16 At the time of the acquisition, it's my
02:38:15 17 understanding, that H3C was a standalone, independent, fully
02:38:21 18 autonomous internal Chinese entity that, in order to do
02:38:25 19 business in China, had to be such. It had to be distant and
02:38:28 20 separate from outside influence that --

02:38:28 21 THE COURT: So it was owned in some way by 3C, but
02:38:30 22 had to have some autonomy --

02:38:32 23 MR. CALLAGHAN: A lot of autonomy, we believe, Your
02:38:34 24 Honor. And then HP comes in as the parent of 3C and takes
02:38:40 25 over, but you still have this autonomous entity working

02:38:44 1 for --

02:38:44 2 THE COURT: So they begin, and the equipment was
02:38:46 3 branded -- it was always called H -- so the H has nothing to
02:38:50 4 do with Hewlett-Packard. The H was there beforehand.

02:38:53 5 MR. CALLAGHAN: I think it had something to do with
02:38:56 6 Huawei or something.

02:38:56 7 THE COURT: I see.

02:38:57 8 MR. CALLAGHAN: So in 2010, middle of 2010, HP
02:39:00 9 takes over, right? It turns out that at some point after HP
02:39:04 10 took over, there became a regime or regimen whereby it -- the
02:39:10 11 equipment was manufactured by H3C for sale in China. It had
02:39:12 12 the H3C logo and trademarks, if you would. But if it was
02:39:20 13 going to be sold overseas, outside of China, it had an HP
02:39:25 14 logo. So at some point after the -- and this isn't Callaghan
02:39:29 15 testifying, Your Honor, I'm just trying to draw you --

02:39:30 16 THE COURT: Yeah. Just to your understanding.

02:39:33 17 MR. CALLAGHAN: When the equipment was sold for
02:39:34 18 use -- the subject equipment was sold for use in the
02:39:38 19 Commonwealth Games with India, would have been before HP took
02:39:42 20 over H3C.

02:39:43 21 THE COURT: So I see. When it was sold out or
02:39:46 22 leased out. It was HP equipment that was not produced by --
02:39:52 23 probably not produced by H3C, because it was prior to the
02:39:56 24 HP's acquisition of 3C?

02:39:59 25 MR. CALLAGHAN: Well, we understand it was always

02:40:02 1 understood to be H3C equipment, but the equipment itself
02:40:06 2 would have been manufactured, we believe, before HP took
02:40:09 3 over.

02:40:10 4 THE COURT: I see. So it was always H3C equipment,
02:40:10 5 but it was sold outside China.

02:40:12 6 MR. CALLAGHAN: Right. It was always our client's
02:40:12 7 understanding that it was H3C equipment.

02:40:16 8 THE COURT: I see.

02:40:17 9 MR. CALLAGHAN: And H3C is not here.

02:40:19 10 H3C apparently did have an opportunity to examine
02:40:23 11 the equipment. HPFS India or HPFS never had direct access to
02:40:29 12 the equipment, never inspected it. So no party before you
02:40:33 13 has inspected the equipment.

02:40:34 14 THE COURT: All right. So what about the general
02:40:36 15 proposal that, in a sense -- in a sense, you've proposed
02:40:42 16 phased discovery, and Mr. Joffe, notwithstanding his cite to
02:40:46 17 the rule, hasn't proposed phase discovery. He says discovery
02:40:50 18 should just begin and that the production happens in the
02:40:53 19 ordinary course. And you're saying, no, phase it. First
02:40:53 20 produce the --

02:40:56 21 So you're saying basically, if we see it and if you
02:40:59 22 look at it and your experts look at it and say it's
02:41:01 23 counterfeit, that's one thing. And then knowing how is it
02:41:04 24 counterfeit might focus and narrow the case. Focus and
02:41:07 25 narrow it in what way?

02:41:11 1 MR. CALLAGHAN: Well, Your Honor, in the normal
02:41:13 2 course, the equipment would be in front of us. We would all
02:41:13 3 have the chance to do content ratings and go forward with
02:41:19 4 that phase of discovery. We could do that. In this
02:41:20 5 instance, the equipment has been sitting in China for at
02:41:22 6 least two years, It appears two and a half years. It could
02:41:24 7 have been here. And I understand there are perils that have
02:41:28 8 been expressed here that have to be taken into account.

02:41:31 9 If we could somehow get it here in the next month,
02:41:34 10 which is sort of our goal, and thereafter fairly quickly get
02:41:38 11 an examination on both sides. We then could agree it's a
02:41:42 12 steam led case, or it's this blanket, universal conspiracy
02:41:45 13 case, based on an assumption that something was counterfeit,
02:41:49 14 may or may not have been counterfeit. An assumption that if
02:41:52 15 it was counterfeit, the guys on one side of the V versus the
02:41:56 16 other side of the V who made it counterfeit, and therefore,
02:41:58 17 we've got this blanket discovery.

02:41:59 18 We think in terms of focusing in -- and maybe it's
02:42:02 19 wishful thinking, but if we could focus in and somehow narrow
02:42:06 20 the case, as a result of examining the equipment, we think
02:42:09 21 that would be the best in terms of just efficiency and
02:42:11 22 hopefully of the Court's management of the case. Having said
02:42:14 23 that, if Your Honor determined that the equipment can come on
02:42:19 24 the one hand, and normal discovery go forward on the other,
02:42:22 25 of course we would abide by the Court's instruction.

02:42:25 1 THE COURT: So I guess my question, that I don't
02:42:27 2 really know the answer to that would be helpful to me is, how
02:42:31 3 long is it going to take to get the equipment? It doesn't
02:42:34 4 seem like -- putting aside the potential peril that Mr. Joffe
02:42:38 5 raises, I would think you could have the equipment in seven
02:42:41 6 days. I mean, like when Apple wants to bring over, they --
02:42:44 7 and I recognize you're not chartering a jet to bring these
02:42:48 8 things over, but essentially, I mean, it doesn't sound like
02:42:55 9 it's that big. I mean, there's planes every day that go from
02:42:58 10 Boston to China. Where is Mr. Cheng's home located? How far
02:43:02 11 from Beijing?

02:43:04 12 MR. JOFFE: About a thousand kilometers.

02:43:06 13 THE COURT: In a major city?

02:43:08 14 MR. JOFFE: Or more -- I remember he was traveling
02:43:10 15 three days on a bus from jail to home.

02:43:14 16 MR. CALLAGHAN: Well, he took it on a bus for a
02:43:16 17 thousand miles, Your Honor. It's not inconceivable that he
02:43:20 18 could get it to an airport or to a UPS store somewhere close
02:43:22 19 to his home.

02:43:22 20 THE COURT: Did you know -- do you have any -- like
02:43:23 21 did the police deliver it to him and he brought it home, or
02:43:26 22 did they deliver it to his home?

02:43:30 23 MR. JOFFE: No, I think the police gave it to
02:43:33 24 him -- I don't want to speculate, Your Honor. I can find out
02:43:37 25 the logistics of how.

02:43:39 1 THE COURT: So this is what I suggest. I would
02:43:42 2 think that you could get this -- putting aside the perils, I
02:43:46 3 don't see why you couldn't have it -- why it's not already
02:43:47 4 here, you couldn't have it in seven days. I mean, maybe
02:43:50 5 14 days is half the price of seven days, then fine.

02:43:56 6 So I think you should talk to each other and tell
02:43:59 7 me how you're going to get it here. And either you've worked
02:44:04 8 out an arrangement among yourselves to get it here and you're
02:44:07 9 satisfied and you don't need anything from me, or you need
02:44:10 10 this court order that you want. I'm happy to issue the court
02:44:13 11 order. And you tell me. Give me the proposed form of order,
02:44:15 12 and I'll issue it or tweak it if I think there's something
02:44:18 13 wrong with it, or I'll have a telephone conference to express
02:44:23 14 to you if there's some issue that I have with it. But I'll
02:44:26 15 turn it around and issue right away if you need that.

02:44:29 16 It will give you a chance to figure out the
02:44:32 17 practicalities of getting it here. And then -- and I guess
02:44:37 18 the question is, do you want to report back to me on that in
02:44:41 19 seven days or 14 days?

02:44:43 20 MR. CALLAGHAN: I'd proposed 14 days, Your Honor,
02:44:45 21 only because the logistics internally from our side. Because
02:44:49 22 we have a bunch of parties that are getting involved.

02:44:52 23 THE COURT: Fine. So why don't you report back to
02:44:55 24 me on the joint report in 14 days about getting the property
02:44:57 25 here, and then I'd like to know the answer to that. Because

02:44:59 1 I do think there's a value in --

02:45:05 2 While I don't agree with you, Mr. Joffe, I agree
02:45:08 3 with the point that you're making. I don't agree with you
02:45:11 4 that it's agreed that the equipment is counterfeit. But I do
02:45:14 5 agree with you that if there is an agreement as to it's
02:45:17 6 counterfeit, it could be significant. You both agree to
02:45:21 7 that. You actually agree more than you all think you do.

02:45:24 8 So -- and knowing -- to the extent it is
02:45:28 9 counterfeit, how it is counterfeit. If there is an agreement
02:45:31 10 between you both that it is counterfeit, it's only
02:45:34 11 counterfeit in one way, it's counterfeit in three ways. You
02:45:37 12 both agree it's counterfeit in one way, but it might also be
02:45:41 13 counterfeit in a second way. That could be meaningful in
02:45:43 14 helping focus the case, because that also --

02:45:47 15 Because I don't understand the case to be solely
02:45:50 16 whether the equipment is counterfeit, but how it's
02:45:53 17 counterfeit and whether -- I mean, as I understand the
02:45:55 18 claims, you have to prove a lot more than that it's
02:45:58 19 counterfeit. But on the other hand, how it's counterfeit
02:46:01 20 bears on, for example, whether HPFS India would have --
02:46:05 21 reasonably should have known, or what have you, and what
02:46:08 22 other various things. So I think it could make a difference
02:46:11 23 in narrowing it.

02:46:12 24 So why don't you report back in two weeks on that,
02:46:14 25 and then I will decide on -- and how to proceed with the

02:46:22 1 schedule.

02:46:22 2 I had one other question. Let me just look over
02:46:27 3 this while I have you here. I think, in the meantime, you
02:46:58 4 both can do initial disclosures by November 3rd. You agree
02:47:02 5 on that, and it's independent of anything else, and we should
02:47:05 6 get started on that. So for now, initial disclosures by
02:47:08 7 November 3rd. The two weeks from today would be -- that
02:47:16 8 would be November 3rd.

02:47:18 9 MR. CALLAGHAN: It would be November 3rd.

02:47:18 10 THE COURT: So you report back to me on
02:47:20 11 November 3rd, and then I'll see where we are and on the rest
02:47:27 12 of the schedule.

02:47:28 13 I don't have any other questions. Anything else
02:47:52 14 either of you wanted to address?

02:47:54 15 MR. CALLAGHAN: Not from us, Your Honor.

02:47:55 16 THE COURT: Anything else, Mr. Joffe and
02:47:57 17 Mr. Miller?

02:47:58 18 MR. JOFFE: So we have one date, actually, for two
02:48:00 19 events for initial disclosures and --

02:48:03 20 THE COURT: Yes. So initial disclosures on
02:48:05 21 November 3rd and a joint report on November 3rd on how you're
02:48:08 22 getting the property back to the United States and when it
02:48:11 23 will be here. And my hoped for expectation is you're able to
02:48:17 24 report on November 3rd -- but in a perfect world you'll be
02:48:21 25 able to report on November 3rd, there are no problems, we

02:48:24 1 shipped it and it's already here. But I recognize it might
02:48:26 2 not be here by November 3rd, and I'm not ordering that it be
02:48:27 3 here by November 3rd.

02:48:28 4 I'm ordering that the two of you talk cooperatively
02:48:32 5 with each other and figure out how you're going to get it
02:48:35 6 here. My general view is, (a), it's coming here, and it's
02:48:38 7 coming here for discovery so everybody who wants to inspect
02:48:41 8 it can inspect it; (b), in the ordinary course, I would view
02:48:43 9 it as plaintiffs' responsibility to bring it here, that is,
02:48:46 10 ordinarily I would tell you ship it from Omaha, put it on
02:48:51 11 FedEx, or ship it from China. Put it on FedEx or DHL, or
02:48:51 12 whomever, and get it here.

02:48:53 13 Given what happened to your clients in terms of the
02:48:55 14 sale of it, and given that H3C is not a party here, formally,
02:49:02 15 and that it's not clear that H3C -- they're not just a
02:49:07 16 wholly-owned subsidiary of a defendant here that just jumps
02:49:11 17 when Mr. Callaghan's clients say jump, necessarily, I think
02:49:16 18 it's fair to proceed with some measure of caution, given what
02:49:20 19 happened. So the two of you should talk about how you're
02:49:22 20 going to get it here.

02:49:23 21 I don't really care who ships it here, it's coming
02:49:26 22 here. And in the ordinary course, I think plaintiff would
02:49:29 23 pay for it, because it would be your responsibility to get it
02:49:32 24 here. But the question of how, the mechanics and logistics,
02:49:38 25 it's like -- it's at your client's house, you have to be

02:49:40 1 involved in this process, Mr. Joffe.

02:49:42 2 MR. JOFFE: We'll be involved. We're going to
02:49:46 3 physically handle the shipping.

02:49:48 4 THE COURT: Right. So you need to figure out, like
02:49:50 5 what is -- what is going to be required to get it out of the
02:49:53 6 country and get it through customs to be here? Would my
02:49:56 7 court order be enough? What else do you need? How are you
02:50:00 8 going to do it? How long will that take? Whatever, and
02:50:02 9 you'll tell me. And then based on that, that -- I'll have
02:50:07 10 that information and then I will -- after you give me that
02:50:10 11 joint report, I will then decide on the rest of the issues.

02:50:17 12 I don't have any other questions about the
02:50:19 13 schedule. I have one minor request, which is just I know
02:50:23 14 that in New York, the federal -- the Southern District loves
02:50:30 15 letters, is my understanding, never having practiced in the
02:50:34 16 Southern District. I have my own theories as to why they
02:50:37 17 prefer letters as to motions filed on ECF, but I'll keep that
02:50:43 18 to myself, since it's not germane to this case.

02:50:45 19 But I prefer that you file pleadings. So in other
02:50:48 20 words, I prefer that you do what everybody -- the way -- so
02:50:51 21 when you file a joint statement, file pleadings of the joint
02:50:54 22 statement, rather than a letter to me. I prefer that, even
02:50:56 23 though you just docket it, it's fine, and what you both filed
02:51:00 24 here is fine. You just put it on the docket and I know that.
02:51:04 25 But if you -- it's just the format that we're more used to.

02:51:07 1 And the reason I say that is I generally don't like
02:51:10 2 it when lawyers write me letters about pending cases for a
02:51:14 3 couple of reasons. If you file it on ECF, it's functionally
02:51:18 4 just a document, anyway. It's not really a letter to me,
02:51:21 5 it's really just on the docket. But as a practical matter
02:51:24 6 for you, you -- if you file it as a letter, the ECF system
02:51:29 7 doesn't necessarily get coded the same way, and that coding
02:51:33 8 sometimes, in terms of being picked up, and all the things
02:51:36 9 that get filed on all the different cases, you're better off
02:51:39 10 filing it as a joint statement for the Rule 16 or as a
02:51:42 11 motion.

02:51:43 12 If you mail it as the letter, then the problem that
02:51:45 13 you have, besides the fact that I don't like getting ex parte
02:51:49 14 letters, even if you copied the other side -- I prefer not to
02:51:49 15 get those letters. I'd rather you file them on the docket,
02:51:52 16 because the first thing I'm going to do with it is docket it
02:51:56 17 on ECF. But the other reason is you actually do your clients
02:52:00 18 a great disservice, because you slow down the speed at which
02:52:02 19 I will respond to it.

02:52:03 20 Because if you docket it, it happens electronically
02:52:06 21 and I will know about it the next day. If you mail it, it
02:52:08 22 goes through, first, screening by the marshal service before
02:52:11 23 it comes into the building, and then it's going to go to the
02:52:14 24 clerk's office. Then somebody in the clerk's office is going
02:52:18 25 to see it's directed to me and has to be delivered to my

02:52:18 1 chambers. That process is going to take way more time than
02:52:22 2 the electronic process.

02:52:24 3 So you know, I know in the Southern District you do
02:52:28 4 it, and I know you're from New York and that's fine. And I
02:52:31 5 know in New York they want that. I know in New York you have
02:52:34 6 to file letters before you file motions for summary judgment.
02:52:37 7 I don't -- to me, that's just an extra step. I have great
02:52:40 8 respect for my colleagues in New York, and obviously given
02:52:43 9 their docket and their -- the issues they confront, it makes
02:52:47 10 sense for them and that's fine. But just as a practice here.

02:52:52 11 All right. Anything else for the plaintiff?

02:52:54 12 MR. JOFFE: Just to clarify, Your Honor, other than
02:52:57 13 November 3rd date, we don't have any --

02:53:00 14 THE COURT: No other dates. Because what's going
02:53:02 15 to happen on November 3rd is you'll file the -- you'll do
02:53:06 16 your initial disclosures to each other. You'll file the
02:53:09 17 joint statement. And then in response to that joint
02:53:11 18 statement, I will do two things. I'll respond to the
02:53:15 19 property question, whatever issues that your joint statement
02:53:18 20 raises for me to respond to, if any. And I have, under
02:53:21 21 advisement, if you will, the schedule.

02:53:24 22 And the particular issue, I'll tell you, that I'm
02:53:30 23 thinking about, is just whether I just start discovery on
02:53:33 24 November 3rd or 5th, or whatever, or whether I should wait
02:53:37 25 for the property and phase it, as they suggest, and have the

02:53:43 1 discovery phased.

02:53:45 2 I will briefly -- since you're here, I might as
02:53:48 3 well comment for you that I'm much more likely to choose
02:53:52 4 the -- an amended pleading date along the lines of what
02:53:55 5 defendant is suggesting at the conclusion of fact discovery.
02:53:58 6 We've been through multiple iterations of amended complaints.
02:54:02 7 The amended complaints started out as this short, tight,
02:54:05 8 narrow six claims, a few pages, and it is now hundreds of --
02:54:10 9 now it's reduced a little bit, but it's quite lengthy. And I
02:54:13 10 just -- and we went through a year-and-a-half process, with a
02:54:15 11 lot of back and forth between the parties and the Court. I
02:54:18 12 just don't see why we -- the need, a date at the end of fact
02:54:23 13 discovery. And it doesn't preclude the possibility of
02:54:25 14 amendments later, it just means you have to show good cause.

02:54:28 15 So I -- the only, really, reason I could see not
02:54:34 16 saying amended pleadings are due today, or November 3rd,
02:54:38 17 would be because I think you should all get to look at the
02:54:41 18 property. And really, it's mostly for the defendants,
02:54:43 19 because you've had the ability since the lawsuit was filed,
02:54:46 20 to look at it, if you wish. But nonetheless, whatever date I
02:54:50 21 set is going to be for both of you, not for one of you. And
02:54:53 22 so as to this issue, which you dispute -- the two of you
02:54:56 23 disagree on, that's what I'm likely to find.

02:54:59 24 I'll look over the ESI protocol issue a little more
02:55:05 25 carefully, but I understand the issue that divides you, and

02:55:08 1 to some extent, this depends on whether it gets narrowed or
02:55:11 2 not. But I am -- my general view of discovery is do it once,
02:55:14 3 not twice. And that ESI is expensive and complicated so, to
02:55:20 4 the extent there's a big-picture issue that influences,
02:55:24 5 like --

02:55:24 6 I'll give you a brief example. I had another case,
02:55:28 7 where they came to me at the Rule 16 and said, "Judge, we
02:55:28 8 have a big dispute about the scope of discovery, and we'd
02:55:32 9 rather resolve it before we do any discovery, than after,
02:55:36 10 because it determined whether we do 40 custodians or four,
02:55:41 11 and it determines whether we do four search terms for each
02:55:41 12 custodian, or 40 for each custodian." And so I said fine.
02:55:44 13 So that made a lot of sense. We briefed that first, I
02:55:47 14 resolved that, and then they did the electronic discovery.
02:55:51 15 Because once you do the electronic discovery, you really only
02:55:55 16 want to do it once, it seems to me.

02:55:57 17 MR. JOFFE: That approach actually works for us.
02:55:59 18 We're happy. We don't focus on the equipment so much as
02:56:02 19 defendants do. Our case is not dependent on --

02:56:03 20 THE COURT: It's focused more.

02:56:05 21 MR. JOFFE: More what they knew and what they've --

02:56:08 22 THE COURT: Yes.

02:56:09 23 MR. JOFFE: -- said in 2013. And for that reason,
02:56:11 24 their contemporaneous reports from 2013 is much more
02:56:15 25 important for me to make my case. I don't need the equipment

02:56:19 1 to make my case. I will have enough with the inspections and
02:56:22 2 the reports and correspondence. If they want to have the
02:56:25 3 equipment and they focus and they bring it up as a big issue,
02:56:29 4 I brought the case, my plaintiffs brought the case, it's our
02:56:32 5 case, it's the way we plead and prove it is up to us.

02:56:35 6 THE COURT: Yes.

02:56:37 7 MR. CALLAGHAN: Your Honor, we --

02:56:41 8 MR. JOFFE: The equipment is not a critical issue,
02:56:44 9 so much as the reports from 2013 authored by plaintiffs --
02:56:47 10 defendants, I'm sorry, Your Honor. It is not nothing, for
02:56:51 11 our case turns until we see their 2013 reports and underlying
02:56:57 12 data.

02:56:57 13 THE COURT: Let me tell you my view of litigation,
02:57:00 14 Mr. Joffe. If you have a case about a bank robbery, do you
02:57:04 15 know what I think lawyers should do? Go to the scene of the
02:57:07 16 robbery. If you have a case about counterfeit equipment, I
02:57:11 17 think that anybody who wants to look at the equipment in
02:57:14 18 which there's a dispute about being counterfeit, is entitled
02:57:16 19 to look at it.

02:57:17 20 Whether it's critical to your case or not, that's
02:57:20 21 for you to decide, not for me to decide. Whether you need it
02:57:22 22 or not, that's for you to decide, not me to decide. But
02:57:26 23 the -- an issue in this case is this equipment and is it
02:57:32 24 counterfeit, and if so, in what way is it counterfeit, and if
02:57:36 25 so, how obvious, or what is the significance, or what have

02:57:39 1 you. An issue is what did they think about whether it was
02:57:44 2 counterfeit, which to some degree might be separate and apart
02:57:45 3 from whether, in fact, it's counterfeit.

02:57:45 4 But nonetheless, having the equipment -- we're
02:57:47 5 going to get the equipment. And they're entitled to inspect
02:57:51 6 the equipment. Whether we should start discovery after
02:57:54 7 November 3rd, before we get it or not, depends in part. But
02:57:57 8 I expect the equipment to come here. I expect it to be made
02:58:00 9 available. And I expect all of you to work expeditiously to
02:58:05 10 get it here, because I think it should be brought here soon.
02:58:06 11 I don't think it should get here at the end of fact
02:58:08 12 discovery. I think it should get here fast. I think there's
02:58:11 13 no -- like but for the concern you raise about the peril, I
02:58:15 14 wouldn't understand why you didn't go back to your office
02:58:18 15 today, call DHL, say, "How much money to send somebody over
02:58:24 16 there, right now, get it, ship it back?"

02:58:25 17 MR. JOFFE: I am -- well, on the same page, I would
02:58:27 18 have done it -- we wouldn't be discussing it here, now if
02:58:32 19 there weren't that little wrinkle.

02:58:34 20 But just on the analogy of the bank robbery, you're
02:58:38 21 right, Your Honor. If there is a bank robbery, you go and
02:58:41 22 inspect the crime scene, which is what they've done in 2013.
02:58:44 23 We have reports of bank robbery inspections.

02:58:47 24 THE COURT: So actually, the reason that I --

02:58:47 25 MR. JOFFE: Let us see those reports.

02:58:50 1 THE COURT: I'll tell you, if you have a bank
02:58:52 2 robbery at Bank XYZ on 1 Main Street and counsel has been to
02:58:59 3 Bank XYZ on Main Street before the robbery, and then later
02:59:02 4 the indictment is brought and he's the prosecutor or he's the
02:59:06 5 defense attorney, he's been to the bank, okay. He might have
02:59:09 6 even looked around the bank for another robbery. Okay? I
02:59:11 7 would think he'd still want to go back to the bank after he
02:59:15 8 knows what the facts -- he knows there's a claim pending
02:59:19 9 about this robbery.

02:59:20 10 You might not do it that way. You don't have to do
02:59:22 11 it that way. I don't really care whether you inspect the
02:59:24 12 property or not. That's up to you. Okay? And it's your
02:59:30 13 decision about whether you look at the property or not. They
02:59:32 14 want to look at it. I can't think of any reason why I
02:59:35 15 shouldn't order it to be here. You haven't advanced any
02:59:38 16 reason why it shouldn't come here.

02:59:40 17 MR. JOFFE: I don't make an argument.

02:59:42 18 THE COURT: And you're not making that argument. I
02:59:42 19 understand. So it's coming here. What is the significance
02:59:46 20 beyond that? We'll see.

02:59:47 21 MR. JOFFE: Right.

02:59:48 22 THE COURT: Anything else you wanted to say,
02:59:50 23 Mr. Callaghan?

02:59:51 24 MR. CALLAGHAN: No. Thank you very much, Your
02:59:52 25 Honor.

02:59:52 1 THE COURT: All right. We're adjourned. Thank you
02:59:52 2 very much.

02:59:55 3 MR. JOFFE: Thank you, Your Honor.

4 MR. CALLAGHAN: Thank you.

5 THE COURT: Thank you.

6 (Court in recess at 2:59 p.m.)

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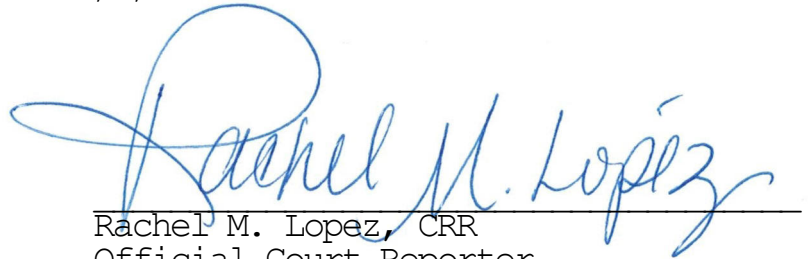
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 6th day of November, 2017.

/s/ RACHEL M. LOPEZ



Rachel M. Lopez, CRR
Official Court Reporter